

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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| IN RE: | . | Chapter 11 |
| | . | |
| OWENS CORNING, <i>et al.</i> , | . | Case No. 00-03837(JKF) |
| | . | Jointly Administered |
| Debtors. | . | |
| | . | June 19, 2006 (10:06 a.m.) |
| | . | (Wilmington) |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 THE COURT: Good morning.

2 MR. PERNICK: Good morning, Your Honor.

3 THE COURT: I apologize for being late. I was
4 talking with one of my colleagues and not paying attention to
5 the time, so, I was on another floor. This is the matter of
6 Owens Corning, Bankruptcy No. 00-3837. The participants I
7 have listed by phone: Kate Stickles, Gary Pachulski, Sara
8 Gooch, Andy Chang, James McClammy, Denise Wildes, Gordon
9 Harriss, David Parsons, Christine Daley, Stuart Kovensky,
10 Judy Liu, Bruce White, Christine Jagde, James Gadsden,
11 Christena Lambrianakos, Dallas Albaugh, John Shaffer, Sara
12 Lorber, Tracy Essig, John Christy, and James Gibb. I'll take
13 entries in court, please.

14 MR. PERNICK: Good morning, Your Honor. Norman
15 Pernick on behalf of the debtors.

16 MR. RAICHT: Good morning, Your Honor. Geoff
17 Raicht, Sidley, Austin on behalf of the debtors.

18 MR. STEEN: Good morning, Your Honor. Jeffrey
19 Steen, S-t-e-e-n, Sidley, Austin on behalf of the debtors.

20 THE COURT: One second, wait one second. Okay. I
21 think I saved it. These computers like to do automatic
22 updates, and there's nothing you can do to stop it, and then
23 it gets - you get this blue screens of death, and I thought
24 that's what was happening. Mr. Steen, I'm sorry.

25 MR. STEEN: Thank you, Your Honor.

1 THE COURT: Go ahead.

2 MR. EISENBERG: Good morning, Your Honor. Adam
3 Eisenberg, Saul Ewing, on behalf of the debtors.

4 MR. LOCKWOOD: Peter Lockwood, Caplin & Drysdale, on
5 behalf of the Asbestos Claimants Committee, Your Honor.

6 MR. RESSLER: Howard Ressler, Anderson, Kill &
7 Olick, on behalf of the Official Representatives of the
8 Bondholders and the Trade Creditors.

9 MR. KRESS: Good morning, Your Honor. Andrew Kress,
10 Kaye Scholer, on behalf of the Futures Representative.

11 MR. KRUGER: Good morning, Your Honor. Lewis Kruger
12 and Ken Pasquale on behalf of various clients.

13 MR. GRAY: Your Honor, good morning. Tony Gray,
14 Brown, Rudnick Berlack, Israels, for the Ad Hoc Committee of
15 Preferred and Equity Security Holders.

16 MR. KLAUDER: Good morning, Your Honor. Dave
17 Klauder for the United States Trustee.

18 MR. SUDELL: Good morning, Your Honor. William
19 Sudell of Morris, Nichols, Arsht & Tunnell for the Official
20 Committee of Unsecured Creditors.

21 MS. ESKIN: Good morning. Marla Eskin, Campbell &
22 Levine, for the Asbestos Claimants Committee.

23 MS. ZIEG: Good morning, Your Honor. Sharon Zieg of
24 Young, Conaway, Stargatt & Taylor, on behalf of the Futures
25 Representative.

1 MR. COBB: Good morning, Your Honor. Richard Cobb,
2 Landis, Rath & Cobb, on behalf of Credit Suisse First Boston,
3 Caymans Branch, as agent for the Bank Group. Your Honor on
4 the phone is Judy Liu of Weil Gotshal and Manges, my co-
5 counsel.

6 MR. CASARINO: Good morning, Your Honor. Marc
7 Casarino of White & Williams, LLP, on behalf of Century
8 Indemnity Company.

9 MR. GIBBONS: And, Your Honor, Joseph Gibbons of
10 White & Williams on behalf of Century Company.

11 MR. MONACO: Good morning, Your Honor. Frank
12 Monaco, local counsel for the designated members.

13 MS. CURRIER: Good morning, Your Honor. Teresa
14 Currier from Klett Rooney here on behalf of J.P. Morgan, and
15 I'm also here with Mark Thompson and Alice Eaten from Simpson
16 Thatcher, also representing J.P. Morgan.

17 THE COURT: All right, thank you. Mr. Pernick.

18 MR. PERNICK: Yes, Your Honor. Your Honor, you were
19 kind enough to enter a number of orders, which I'll just put
20 on the record and to make sure that they comport with your
21 records. You entered an order in item number 1, dealing with
22 that omnibus objection (in part), that's the thirty-ninth
23 omnibus objection; number 2 (same, in part), that's the
24 fortieth; 3 (in part), that's also an omnibus objection;
25 number 4 (in part) is an omnibus objection; and number 5 (in

1 part) is an omnibus objection; number 6, which was the St.
2 Joseph's asbestos property damage claims objection; number 7,
3 which was the Praxair settlement, another property damage
4 claim settlement; number 8, OCI, was another property damage
5 settlement; number 9 dealt with miscellaneous property damage
6 claims; 10, which was the Shintech settlement; 11, which was
7 the Tobacco settlement; 12, which was E&Y supplemental
8 retention; and 15 dealt with the syndication agreement under
9 seal. We also have continued, item number 16, which is the
10 equity commitment agreement motion. That's for Friday. I
11 believe it starts at 9:30 and it's in Pittsburgh.

12 THE COURT: All right.

13 MR. PERNICK: And then continued as to certain
14 claims that's going to the July 24th hearing, number 1, 2, 3,
15 4, and 5. So that leaves us with three items going forward:
16 number 13, which is the revised voting procedures; number 14,
17 which deals with the plan support agreement motion; and
18 number 17, which is a status conference on the Committee's
19 professionals, and what I'd suggest is on number 13, the
20 voting procedures, we just have a redlined and a clean form
21 of order to hand up that I believe has been agreed to by
22 everybody and is consensual.

23 THE COURT: On which item?

24 MR. PERNICK: On number 13, the revised voting
25 procedures.

1 THE COURT: Thirteen, okay, thank you.

2 MR. PERNICK: And then we'll take number 17 to the
3 extent the Court would like it, which is the status
4 conference, and then number 14, the plan support agreement
5 motion. That's the one that's actually going probably have
6 the most discussion.

7 THE COURT: All right.

8 MR. PERNICK: Mr. Eisenberg is going to handle
9 number 13, Your Honor.

10 THE COURT: Thank you.

11 MR. EISENBERG: Good morning, Your Honor, Adam
12 Eisenberg, Saul Ewing, on behalf of the debtors. Your Honor,
13 I have a fair amount of paper here. If it's helpful to the
14 Court, I could hand up a clean and a blackline copy.

15 THE COURT: Sure. Thank you.

16 MR. EISENBERG: Your Honor, I think I can be pretty
17 brief because I think we've resolved all our issues at this
18 point. Briefly, we were in front of the Court back in April
19 on this matter. Your Honor had made a couple of comments.
20 We have made those changes as directed by the Court. We have
21 also made a series of changes as required by the new plan
22 that was filed, for example, now we have Class A-12, which is
23 equity voting, et cetera. So what we've done is on May 22nd,
24 Judge, we filed a clean and a blackline version of these
25 documents. We only received two responses, one informal and

1 one formal. The one objection to the voting procedures that
2 was actually filed, was by the Bank of New York, which is
3 indenture trustee with respect to the NIPS. We also received
4 some comments from Tony Gray, who is here on behalf of the Ad
5 Hoc Equity Committee. Your Honor, we worked out those
6 issues. Those changes which had been agreed to by the
7 relevant parties are in the blackline. Judge, the blackline,
8 just so it's clear, reflects the changes for the May 22nd
9 document to the one, the clean that I just handed up this
10 morning.

11 THE COURT: Okay.

12 MR. EISENBERG: Unless Your Honor has any questions,
13 I would just leave it at that, and ask that the Judge issue
14 this order.

15 THE COURT: What's the resolution with respect to the
16 issues that were raised by Mr. Gray with respect to the NIPS
17 issue?

18 MR. EISENBERG: Your Honor, what we did is the NIPS are a
19 little bit of a hybrid, Your Honor, and what we did is those
20 NIPS vote in terms of units or shares. So, if I have five
21 NIPS, I vote five. So the documents have been changed to
22 reflect that, but we also need a conversion factor, Judge, to
23 convert those units of NIPS into dollars for purposes of
24 tabulation under the plan. So what we've done is the NIPS
25 convert at \$50 per NIPS with all rights reserved if at some

1 future date that turns out to be disputed. We do not think
2 it's very likely that that will occur.

3 THE COURT: So the \$50 is agreed upon?

4 MR. EISENBERG: It's agreed upon, but we reserved
5 the rights of the parties to argue differently later, and I
6 could get into the reason for that if you'd like. It's
7 actually very simple, but it's a little - Well, it's not so
8 simple, but it gets into the issue of the number of NIPS
9 versus the total debt being voted. The actual offering
10 memorandum talks about a liquidation preference vis-a-vis the
11 NIPS at \$50 per NIP, and that's what we put in the documents,
12 with the reservation of rights for parties to object later.
13 We think it is very unlikely that those issues are going to
14 come up.

15 THE COURT: All right. Has everyone seen the
16 modified version of this order?

17 MR. EISENBERG: Your Honor, the Ad Hoc Committee has
18 seen it, the Bank of New York has seen it. I've left some
19 copies on counsel table this morning, but the only parties
20 who had real interest in these issues have seen these new
21 drafts and, I think I can represent, are okay with it.

22 THE COURT: All right, Mr. Gray, any responses?

23 MR. GRAY: Your Honor, thank you. I have no further
24 response, Your Honor. Our comments, we believe, are
25 reflected in the revisions before you. One other point is

1 that with respect to Class A-12, there's now a clarification
2 that the holders, only the holders of the existing Owens
3 Corning common stock will be voting in Class A-12. That's
4 just a clarification to make sure that that's reflected in
5 both the order and in the ballots.

6 THE COURT: All right.

7 MR. GRAY: Your Honor, we are still in the process
8 of working with the debtors with respect to the plan and the
9 disclosure statement to make sure that those items comport
10 with the settlement term sheet that the parties entered into
11 last month, and so, the Ad Hoc Committee does reserve it's
12 rights as to those items, but with respect to what's before
13 you, we have no objection to the Court entering the proposed
14 plan solicitation and voting order. Unless Your Honor has
15 any other questions.

16 THE COURT: Okay, I'm not sure who's -

17 MR. GRAY: Thank you.

18 THE COURT: - representing the agent. Mr. Cobb,
19 was it? I'm not sure who has concerns about the NIPS issue.

20 MR. GADSON (TELEPHONIC): Your Honor, it's James
21 Gadson, Carter, Ledyard & Millburn LLP in New York -

22 THE COURT: Yes.

23 MR. GADSON (TELEPHONIC): - representing the Bank
24 of New York, successor trustee.

25 THE COURT: Thank you.

1 MR. GADSON (TELEPHONIC): I can confirm Mr.
2 Eisenberg's statements that the objections raised by the Bank
3 of New York to the voting procedures have been resolved, and
4 I formally withdraw the objection. Like the Ad Hoc
5 Committee, the bank reserves any disclosure statement and
6 plan issue.

7 THE COURT: All right, thank you.

8 MR. GOLDBERGER: Your Honor, that's all I had. If
9 you have specific questions about some of the change, I'm
10 happy to try to address them.

11 THE COURT: Well, I don't because I haven't read
12 them. So, I think what I will do is take this back with me
13 after court and take a look. Well, let me look at the
14 blackline now and see if there are not significant changes,
15 maybe I can just do it now. Okay, the changes really do seem
16 to be just as the three of you have reported them to be on
17 the record, so I'll sign this order.

18 MR. EISENBERG: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. PERNICK: Your Honor, item number 17 is the
21 status conference, the monthly status conference regarding
22 the Committee's professionals and I know that the Agent Bank
23 and the Official Representatives both filed reports. I'm not
24 sure if the Court has any other questions or wants to hear
25 from them, but that's the next item on the agenda.

1 THE COURT: I guess at this point I'm not clear what
2 is still be litigated if everyone but perhaps some of the
3 insurers are onboard with the consensual plan, so, why do I
4 need two entities now?

5 MR. PERNICK: Well, I'll let each of them speak and
6 then the debtor - I mean we may have some comments based on
7 what they say.

8 THE COURT: Good morning.

9 MR. RESSLER: Good morning, Your Honor. Howard
10 Ressler, Anderson, Kill & Olick, the Official Representatives
11 of the Bondholders and Trade Creditors. Your Honor, you will
12 recall that there are basically two pending adversary
13 proceedings relevant to our involvement. One is the bank
14 adversary action pending before Judge Fullam, the other is an
15 action, an equitable subordination action, pending before
16 Your Honor. Under the settlement term sheet, those actions
17 would be tolled and stayed. I believe the Court actually
18 directed the parties to make joint motions to toll and stay
19 the respective actions. Those actions have been prepared and
20 we're in the process of getting signatures from the various
21 parties to those proceedings. There are about eight or nine
22 banks which are not represented by Weil Gotshal, in some
23 cases by in-house counsel or otherwise, and that slowed this
24 process down slightly, but my guess is by the end of this
25 week or next week, those additional signatures will be

1 obtained, those motions will be filed, but I guess the answer
2 to your question is, our role obviously is diminished at this
3 point. I think what we're doing, essentially, is just
4 monitoring the proceedings to make sure that the rights which
5 we believe that we've obtained on behalf of our
6 constituencies are upheld through the disclosure statement
7 hearing and through confirmation, but obviously, our
8 involvement is, well, you know, diminished from what it was
9 when the litigations were active. I believe from reading the
10 bank's report, they've taken sort of a similar position to
11 the core which is also that they're really basically
12 monitoring the proceedings at this point, but I'm sure they
13 want to be heard as well. Thank you.

14 THE COURT: All right, who wants to speak for the
15 banks, please.

16 MS. LIU (TELEPHONIC): Yes, good morning, Your
17 Honor. This is Judy Liu on behalf of the banks, and I guess
18 I would echo the comments just made. We are basically in a
19 monitoring role right now, just to insure that whatever the
20 banks were supposed to get under the fifth plan is carried
21 through in the sixth plan, and with the actions otherwise
22 stayed, it's more or less a monitoring role.

23 THE COURT: Okay, thank you. Mr. Pernick?

24 MR. PERNICK: Your Honor, that's what I was hoping
25 we were going to hear, and the debtor's fine with that

1 monitoring role. We think the amount of fees that will be
2 spent are appropriate under those circumstances for those
3 parties just to make sure that the agreements that they
4 reached are actually implemented, and as long as it stays in
5 monitoring or if for some reason the parties need to do more
6 than that, they let the Court know, that's fine with us.

7 THE COURT: Okay, I'll just ask, I guess, that I
8 continue to get a status report simply so that I can find out
9 that in fact everything is stayed pending confirmation and
10 find out whether there are any other surprises out there.
11 Okay, Mr. Pernick, thank you.

12 MR. PERNICK: And that leaves us, Your Honor, with
13 item number 14, which is the plan support agreement motion,
14 and Geoffrey Raicht firm, the Sidley firm is going to handle
15 that.

16 MR. RAICHT: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. RAICHT: Geoffrey Raicht, Sidley Austin, on
19 behalf of the debtors. Your Honor, how I would like to
20 proceed is to give the Court an overview and a background as
21 to how we got here and then dive into the substance of both
22 the motion and address the objections and then certainly
23 allow any party who wishes to be heard in favor of the motion
24 or opposition to it to be heard, if that's okay with Your
25 Honor.

1 THE COURT: That's fine.

2 MR. RAICHT: You know, this motion is really
3 predicated, Your Honor, on an event at the end of last year,
4 which was the filing of the fifth amended plan on December
5 31st. That plan was filed after five years of litigation,
6 after the Third Circuit reversed the Sub-Con ruling and
7 directed the debtors to file a plan by December 31st, which we
8 did. That plan, Your Honor, we believe was confirmable on
9 its face. It provided a radicle distribution to all
10 creditors below the banks consistent with the Third Circuit's
11 Sub-Con ruling. However, Your Honor, at that time or around
12 the time we filed the plan, certain representatives of the
13 bondholders announced that they had a blocking position and
14 would not support that fifth amended plan. So, what turned
15 out to be a plan that we perhaps would go forward on turned
16 out to be a springboard for discussions and negotiations
17 among the various parties, because the debtors, well, if we
18 had to, we would go forward with that plan, it has always
19 been our hope that we would have a consensual plan among all
20 the credit constituencies. So that negotiation occurred, and
21 as a result, on May 10, the debtors were happy to report that
22 a settlement in principal had been reached among all the
23 representatives of the major constituencies. And also on
24 that day, Your Honor, the debtors announced that a settlement
25 term sheet had been agreed to, and that term sheet was

1 negotiated primarily among the representatives of the
2 creditor constituencies with the debtors' assistance, which
3 outlined the terms of a consensual plan to be embodied in a
4 sixth amended plan. The parties to that agreement
5 represented - that agreement represented a significant
6 milestone in these cases, and literally permitted the debtors
7 to turn the corner and to get to a largely consensual plan,
8 which would be the first such plan in these cases, but more
9 importantly - Well, I shouldn't say more importantly, but
10 certainly an important aspect of that settlement was
11 resolution of various litigations to which Your Honor just
12 heard. That is the Cybergeneics litigation, the estimation
13 litigation, and the equitable subordination litigation. So,
14 we have a term sheet that had been filed with the Court on
15 May 10th, on public notice, and on May 23rd, the debtors filed
16 the plan support motion, and they filed that under § 363 and
17 under 9019. The parties to the agreement, Your Honor, are
18 the debtors, asbestos, the futures representative, and
19 registered holders holding the majority of the aggregate
20 principal amount of pre-petition bonds issued by Owens
21 Corning. I think it's important to understand, Your Honor,
22 that when this plan support agreement and term sheet were
23 entered into, those members of the bondholders had executed
24 confidentiality agreements, which had given them in their
25 negotiations a level playing field with asbestos and the

1 futures representative on information to make a reasoned
2 determination about whether or not it was appropriate to
3 enter into this plan support agreement. Let me pause for a
4 minute, and let's describe what the plan support agreement
5 does and what it doesn't do. I think it's important. The
6 plan support agreement seeks authorization to implement and
7 execute the plan support agreement, which is literally, it
8 takes the term sheet, which is a three-page document annexed
9 to Exhibit A and gives it legs. It allows it to implement
10 and execute. However, if certain conditions are not met, and
11 each of the holders agrees to support - let me rephrase it
12 right. If certain conditions are met, each of the holders
13 agrees to support the plan, but there are preconditions and
14 they are numerated in the document. I think it's important
15 just to run through them briefly. First, is that each of the
16 plan, the disclosure statement, and all the rights offering
17 documents are reasonably and satisfactory to the holders.
18 The second, is that the material terms of those plan
19 documents are substantially identical to the terms set forth
20 in the plan support agreement. Third, the disclosure
21 statement aptly describes the terms of the settlement term
22 sheet that's going to be embodied in the plan and is approved
23 by this Court, and finally, there are no material
24 modifications of the plan documents, and there's no material
25 breach of the plan support agreement. That's what it does,

1 Your Honor. What it doesn't do: The plan support agreement
2 does not solicit any party's vote. It does not seek approval
3 of the substantive provisions of the sixth amended plan. All
4 of the treatment and distribution mechanisms under the plan
5 are all subject to confirmation and 1129 standards. So, Your
6 Honor, as we said, we have a term sheet, we filed a plan
7 support agreement, and then, Your Honor, on June 5th as the
8 Court knows, the debtor filed it's sixth amended plan which
9 is probably the single most important development in the
10 debtors' cases, and as Your Honor knows, a hearing to approve
11 the disclosure statement has been set up for July 10th, and
12 the debtors are not and they will not solicit votes until a
13 disclosure statement is approved with respect to that plan.
14 As Your Honor just observed with Mr. Eisenberger's
15 presentation, that the voting procedures, an order has now
16 been signed by this Court. That's where we are at the
17 moment. We now have had two objections filed. One is by
18 Century Indemnity Company and the other is by the U.S.
19 Trustee. I'll take Century first, briefly, and I'll
20 certainly allow at the end of my presentation if they wish to
21 be heard or clarify my statements, that's certainly
22 appropriate. I believe their objection, Your Honor, to the
23 extent the plan support agreement and the settlement term
24 sheet limits what the debtors can put into the plan, it may
25 violate their rights as an insurer. I believe, Your Honor,

1 that Century's objection is more of a disclosure statement or
2 confirmation objection. They're not a party to the plan
3 support agreement and nothing prejudices their rights to make
4 those objections at the appropriate time. That's the
5 debtors' view. They certainly can be heard on that
6 subsequently. But the more immediate objection, Your Honor,
7 if I can is the U.S. Trustee's objection, and their objection
8 is that the plan support agreement is an improper
9 solicitation under 1125, which is obviously, Your Honor, a
10 very serious charge from the debtors' perspective. It's the
11 debtors' view, Your Honor, that the plan support agreement is
12 a classic embodiment of a highly negotiated instrument that
13 lays the groundwork and lays the way for a consensual plan,
14 which is the hallmark of Chapter 11. As Your Honor knows,
15 consensus between a debtors and its creditors that leads to a
16 successful reorganization is exactly what Congress intended
17 under the Bankruptcy Code. And a settlement of this
18 complexity and involving a creditor constituency with this
19 level of sophistication has to be reduced to writing if it's
20 going to have - if it's going to be anything. And as Your
21 Honor is aware, the parties to this document are
22 sophisticated. They're represented by lawyers and other
23 professionals. And it's also important to note, I believe,
24 Your Honor, that these parties to the document largely
25 purchased their obligations or their debt post-bankruptcy

1 during the course. They got into this process with their
2 eyes wide open. That's kind of where we are as a policy
3 matter, but as a legal matter, Your Honor, I think that the
4 plan support agreement fully complies with the controlling
5 law of this circuit, Century Glove. Century Glove, which as
6 Your Honor knows, defines what a solicitation is. It states
7 very clearly and holds very clearly that the word
8 "solicitation" must be read narrowly, and to define it
9 broadly, would inhibit prior negotiations. And the purpose
10 of negotiations is to reach compromise over terms of a
11 tentative plan, but compromises among creditors, Your Honor,
12 we don't believe are solicitations. And particularly, Your
13 Honor, this plan support agreement is not a solicitation
14 under 1125. And to be quite frank, Your Honor, it was
15 carefully crafted by the parties not to be interpreted as
16 one. The debtors have not solicited votes to any party, and
17 the plan support agreement does not make a specific request
18 for an official vote.

19 THE COURT: Well, why is it needed?

20 MR. RAICHT: Well, Your Honor, I think it is needed
21 very simply. One is that we have, again, a large complex of
22 issues that need to be resolved and reduced to writing that
23 enables the parties to move forward so we all know what the
24 terms are going forward.

25 THE COURT: But isn't that what the plan does?

1 MR. RAICHT: That is what the plan is going to - We
2 anticipate the plan is going to do, Your Honor, but there is
3 obviously time between now and the plan to get there, and one
4 of the key provisions, Your Honor, of the plan support
5 agreement which the U.S. Trustee observed is a provision
6 about claims trading, and if you have a deal or an
7 arrangement or an agreement with certain creditors, if you
8 don't - I guess, if you don't then have them agree to it, and
9 they agree not to trade their claims, you will in essence,
10 Your Honor, be having to re-cut deals again and again, and
11 this gives certainty to the process, Your Honor.

12 THE COURT: Well, you can do that by setting a
13 voting deadline date, you know, holders of record on such and
14 such a date are the ones who can vote, so, send out a notice
15 that says, Tomorrow is it, folks. If you hold the claim
16 tomorrow, you vote, and if you don't, you don't. Won't that
17 lock everybody in?

18 MR. RAICHT: I don't - Respectfully, I don't think
19 so, Your Honor. I think that what happens is that, you know,
20 first the voting deadline, perhaps, is some point out at a
21 later date. What we're talking about is between now and
22 voting after the disclosure statement goes out, you would
23 like to have the certainty that these parties are obligated
24 under a document.

25 THE COURT: Excuse me, a minute. Somebody is trying

1 to use this computer as a fax. Okay, I apologize, I think
2 I'm back to being able to take notes again. The debtor wants
3 to be sure that everyone's going to hold to the deal, that's
4 where I started getting fax.

5 MR. RAICHT: And I think that's right, Your Honor.
6 And as Mr. Pernick and I were just discussing, you know, the
7 other piece of this, Your Honor, is that on Friday in
8 Pittsburgh there's going to be a hearing on an equity
9 commitment agreement, which has significant financial
10 obligations to it. Again, all the parties need to know what
11 the road map's going to be, and if there is questions, if
12 there's insecurity about that, Your Honor, I think it's
13 detrimental.

14 THE COURT: But if the debtors filed the sixth
15 amended plan and the sixth amended plan encompasses the items
16 that are covered in the plan support agreement, and the
17 parties have already told the debtor that provided the plan
18 says X that they're going to vote for the plan, I'm not sure
19 what the plan agreement does. I don't necessarily see it as
20 a solicitation document. I'm just not sure why it's
21 necessary. It's almost as though you're trying to get pre-
22 approval for the plan without getting the plan pre-approved.

23 MR. RAICHT: Understood, Your Honor, and I think,
24 again, let me try and go back to the initial point, which is
25 - and your question's a good one. If we have a document - If

1 we have technically an agreement today that says if the plan
2 provides X and the plan delivers X, you know, you will
3 support the plan. The problem is, Your Honor, that you have
4 these particular individuals today. There are 16 signatories
5 to it on behalf of the bondholders. If they trade their
6 claim tomorrow, then - without the plan support agreement in
7 place, then that particular party is not in any way needs to
8 be part of that obligation.

9 THE COURT: That's why you set a bar date or voting
10 deadline date, I'm calling it a bar date. You know, you say,
11 Holders of claims and bonds as of a certain date vote and the
12 rest don't.

13 MR. RAICHT: Well, Your Honor, again, I think that
14 from our perspective I think that, you know, there are -
15 there's a time delay to get there, number one, that would
16 certainly - as we stand here today, Your Honor, we are trying
17 to have it approved so that we all go forward during the
18 voting process during the plan solicitation process, and if
19 we wait that long, I think, again, we run the risk that we
20 will lose parties, and we will lose a consensual plan or a
21 largely consensual plan.

22 THE COURT: Pardon me. Is there something that I
23 can do that stops this fax from -

24 UNIDENTIFIED SPEAKER: Automation is . . .
25 (microphone not recording).

1 THE COURT: I'm sorry, but I can't take notes
2 because it won't let me do that, so, and I would prefer to
3 make sure I have notes on this. I'm just going to have to
4 ask you stop until someone gets here and gets this resolved.

5 Now, it's not doing it. Can you call them please
6 and ask them if they could come up. Counsel, it stopped
7 doing that temporarily, so let's see how far we can go, and
8 if it starts giving me fax information, I'll just have to ask
9 you to stop. I guess the other thing is that I'm not also
10 sure why you can't lock in the vote with respect to a
11 particular bondholder, and if the claim trades, it trades
12 with that vote locked in.

13 MR. RAICHT: Let me try and address that with two
14 points, Your Honor. First, in terms of a voting deadline,
15 we're talking about sometime in the future, 60 to 90 days.
16 This debt, these bonds, Your Honor, I think it's fair to say,
17 trade hourly, and if you're talking about between now and
18 that 60 to 90 days, that the parties who stand here today may
19 not be the parties that are here tomorrow. That puts this
20 agreement, that puts this framework for a consensual sixth
21 amended plan at great jeopardy, and again, Your Honor, people
22 need certainty because there's money if Your Honor approves
23 an equity commitment agreement on Friday which provide, I
24 think - is it June 30th? That June 30th there's a \$100 million
25 fee that gets paid out which is irrevocable, and I think that

1 the parties need to know that as we go down that road, that
2 we have a structure that's solid and a structure that can be
3 relied upon, and we don't want to have, you know, we don't
4 want to rely upon at some point down the road other parties
5 who we have to re-cut a new deal with. And that's a major
6 risk, which is why we entered into this agreement - Oh, oh,
7 are we getting a fax again?

8 THE COURT: Okay, go ahead.

9 MR. RAICHT: I'm not sure if Your Honor is getting
10 exasperated with me or the fax machine.

11 THE COURT: No, it's the fax machine.

12 MR. RAICHT: That's my point, Your Honor. Those are
13 the two major points which is, with all due respect, Your
14 Honor, I think that voting in this context on this fast
15 track, Your Honor, and again the volume of the debt that
16 could trade quite regularly, it puts the deal potentially at
17 risk, and that's why we wanted to have this agreement in
18 place and also again, as we've discussed, because there is a
19 potential equity commitment or a payment under the equity
20 commitment agreement paid June 30th, I think we need to know
21 that we're all holding hands.

22 THE COURT: All right. Pardon me. We're going to
23 take a recess so this can be checked.

24 MR. RAICHT: Sure.

25 (Whereupon at 10:39 a.m. a recess was taken in the

1 hearing in this matter.)

2 (Whereupon at 10:44 a.m. the hearing in this matter
3 reconvened and the following proceedings were had:)

4 THE COURT: Okay, counsel, sorry, we'll try it
5 again.

6 MR. RAICHT: That's quite all right, Your Honor. I
7 want to try to make it understood one or two more
8 observations about this point, Your Honor, and then I'll try
9 to move on unless Your Honor has more questions, and they
10 are, I think, three short ones. First, Your Honor, I think
11 that the notion of a record date is problematic because the
12 whole purpose of this document is to say that if you buy the
13 debt, if you buy the claim, the obligation goes with it, and
14 I'm not sure a record date by itself gets us there, that's
15 number one. Number two is that if we do have this
16 uncertainty and our timetable gets thrown off or for whatever
17 reason there is a significant economic impact to the debtors'
18 estate, I believe if we have to push back our timetable,
19 there is a \$30 million fee that has to be paid to extend it,
20 which is obviously not money that the debtor wants to be
21 spending at that time. We're all working hard towards that
22 deadline, and we want to try and meet it without further
23 expenditure. And lastly, Your Honor, on this point, you know
24 this motion was made under both 363 and 9019, and 363 is a
25 business judgment rule, and I think it is in the debtors'

1 business judgment that this is a transaction that is in the
2 best interest, but also observe, Your Honor, more than
3 anything I'm going to ask in a few moments of Mr. Lockwood or
4 Mr. Kress to take the podium that - and if anyone else wants
5 to be heard on it, they support this. This is not something
6 - the only party that has objected to this and the mechanism
7 is the U.S. Trustee, but the parties who are signatories to
8 it have agreed to these terms.

9 THE COURT: Well, I would hope they would.

10 MR. RAICHT: That's right, that's right. And we
11 haven't found any objection from them. I'd be here standing
12 on a different reason if that were the case, and I do, Your
13 Honor, I've heard your points. I want to quickly go through
14 on a couple and I'll give up the podium to Mr. Lockwood and
15 Mr. Kress, which is, this motion, we've obviously done this
16 in a public forum. Not only did we file the term sheet, we
17 have filed a motion for a specific approval. We have not
18 done what has been done in other cases in this jurisdiction,
19 which are merely filing it, annexing it to a document, and
20 putting it on notice to people in that format. We've
21 actually put it on specific notice pursuant to a motion.
22 We've done everything in the light of day. I think, Your
23 Honor, I've gone into with you why I think it would be no
24 harm to debtors' estates if the PSA is approved. Actually, I
25 do think that there would be significant damage to the estate

1 if it were not approved, and in addition to the economic
2 issues and the voting issues, there is a risk, Your Honor,
3 that the settlements that we talked about before, the
4 Cybergenics and the equitable subordination and the
5 estimation, that's all encompassed as part of this process,
6 as part of this settlement, and if we unwind this document,
7 you know, question mark as to how those are going to be
8 treated going forward. That's the points I wanted to make,
9 you know, on direct presentation, Your Honor. I do think it
10 might be helpful to hear from Mr. Lockwood and Mr. Kress on
11 some of the points that you've raised.

12 THE COURT: Well, I have one - I'm not finished.

13 MR. RAICHT: I'm sorry, Your Honor.

14 THE COURT: Century's objection also indicates that
15 part of this document is - that the parties to the appeals, I
16 guess, other than Century will be withdrawing their appeals.
17 All right, so, what happens - I mean if Century is party to
18 the appeals and Century isn't a party to this document and
19 isn't withdrawing the appeals, then I'm not sure what's been
20 gained.

21 MR. RAICHT: Well, I think it is part - I think,
22 Your Honor, that the - there are specific appeals, if I'm not
23 mistaken, that are addressed by this, and it is those appeals
24 that are identified by the parties to the agreement, and
25 Century not being a party to the agreement, I think it's

1 outside that scope, but I think that in terms of the core
2 parties that need to be under an agreement are the ones who
3 have signed this.

4 THE COURT: But, I don't quite follow that, because
5 estimation's one of them, and so if Century is successful in
6 showing, for example, that the estimation isn't 7 billion,
7 it's 2 billion, then the whole plan doesn't work on the basis
8 that it's structured anyway. So, as long as that appeal's
9 still going, I don't see what you've gained.

10 MR. RAICHT: Mr. Lockwood who represents asbestos
11 would like to be heard on that point.

12 MR. LOCKWOOD: Your Honor, you're going to hear me
13 mention insurance neutrality, our favorite topic. We have in
14 addition to making the arrangements that are set forth in the
15 term sheet, which is attached to this document, put in
16 provisions in the plan, in the new sixth amended plan, which
17 basically say that the estimation - we've modified the old
18 provision which said that Century was bound by the
19 estimation. We've now said Century isn't bound by the
20 estimation, and that indeed the estimation shall have no
21 effect on Century. If Century perseveres in its appeal, we
22 will be arguing to the Third Circuit that that appeal should
23 be dismissed on the ground that Century no longer has any
24 interest in the amount of the estimation because it's not a
25 creditor. It's distributable share isn't affected by it, and

1 it's not bound by it under the plan, and we also have
2 combustion engineering kind of nothing in the plan shall bind
3 Century that we're also putting in, so, while I think that
4 there is a theoretical possibility, I suppose, that Century
5 could come up with a different number, it's pretty unlikely,
6 and after all, nothing in this world is sure, safe death and
7 taxes, and there's, furthermore, an argument that if the plan
8 is voted on and it's a consensual plan, the creditors can
9 make any - they can use a plug number whether it originated
10 with Judge Fullam or they pulled it out of their ear. I mean
11 this is pot plan, and if we want to put in \$7 billion and
12 everybody agrees to it and everybody votes for it, then even
13 if the Third Circuit said, Judge Fullam got it wrong, that's
14 not going to overturn a creditor vote after a disclosure
15 statement and no impaired class. So, at the end of the day,
16 I don't believe that Century has any possibility whatsoever
17 of overturning a plan with that number in it if it's voted on
18 by the creditors anymore than if somehow or another some of
19 the other actions got reinstated for some reason or another
20 and produced some result that was different from what the
21 voted confirmed plan provided for. With respect to the
22 issues addressed by Mr. Raicht, I think it's important to
23 note that we're not only just the signator of the Asbestos
24 Claims Committee's document, we were, at least, I think, as
25 interested in making it happen as the debtor was. Your

1 Honor's listened over the five years that this case has been
2 going on and a number of other cases that you and I have had
3 during the same period to a whole lot of discussions about
4 what happens when Congress does things with the Fair Act and
5 how that changes the calculus of people's motivations about
6 what they do or don't want to do in one of these asbestos
7 plans. In addition to that, Owens Corning has stock that's
8 actively trading in the market. The bonds are actively
9 trading in the market. What happened here was through a
10 confluence of events, the asbestos constituencies on the one
11 hand and the dissenting creditor bondholders and bank debt
12 holders on the other who had blocking positions, I mean, they
13 came right out and said it in open court. We looked up the
14 votes. They were right. We couldn't get a plan confirmed on
15 a consensual basis, so we had to sit down and negotiate,
16 which as Mr. Raicht said, it's exactly what you're supposed
17 to be doing in a plan, but given the volatility if you will
18 of the pieces of this from the asbestos constituencies' point
19 of view, if you look at the term sheet, the various things
20 that are going on here is effectively a constructive sale of
21 the stock that would otherwise be going to asbestos interests
22 through the trust to the very bondholders that are the
23 parties to this plan's supporting agreement and also parties
24 to the equity commitment agreement, and for this plan to
25 work, that structure has to get locked into place. If this

1 plan support agreement isn't approved, then effectively the
2 bondholders have the ability to sort of give us a handshake
3 deal, but if the market goes in the tank or Congress re-ups
4 the Fair Act next month, and it really looks like it's going
5 to pass or something like that, it would be a tremendous
6 economic incentive for them to say sayonara to the whole
7 deal, and it has nothing to do with bad faith or anything
8 else. I mean, if you're not contractually bound to do
9 something, then not doing it is not a breach of anybody's
10 obligation to anybody else. And frankly, that's the purpose
11 for this agreement, and while the U.S. Trustee has raised
12 some technical arguments about, you know, voting and that
13 sort of thing, the fact is, if you accept the argument they
14 way they're posturing it, it's virtually impossible to
15 contemplate any sort of complex bankruptcy of the sort that
16 we're looking at here ever being worked out pre-confirmation
17 in some sort of a consensual deal where the parties to the
18 deal are making economic commitments to each other that are
19 implemented through the plan. So, we would respectfully urge
20 Your Honor to uphold the plan support agreement here as being
21 in the best interest of all the creditors of this debtor as
22 well as the debtor itself. Thank you.

23 MR. PERNICK: Your Honor, two quick points: One, Mr.
24 Lockwood said if the market tanks. I'm not sure if that's
25 correct. I think that's probably already happening, but, on

1 the estimation point, just - and my colleagues will correct
2 me if I get this wrong, the procedural status is there were
3 actually two appeals, one by the banks and one by Century.
4 In the term sheet, everybody except for Century agreed to
5 stay those appeals pending dismissal if the sixth amended
6 plan was confirmed. Century refused to do so, although we
7 requested that they do so as a group, and we filed a motion
8 with the Third Circuit. Now, the Third Circuit entered a
9 stay of Century's appeal pending plan confirmation. So, the
10 confirmation objection that Century has theoretically is, the
11 plan proposes that that litigation be dismissed. They can
12 object to that at confirmation. Your Honor can rule on it.
13 So that's the technical answer to that question, and right
14 now it's stayed, and it's pending a potential, I guess,
15 confirmation fight if Century wishes to raise that objection,
16 and we'll deal with it at that time.

17 MR. KRESS: Good morning, Your Honor. Andrew Kress
18 on behalf of the Futures Representative. I'm not going to
19 repeat everything that my colleague, Mr. Lockwood, said, but
20 I do want to emphasize the importance of keeping the deal
21 together. We unfortunately went down that path in Armstrong
22 where we thought we had reached an economic agreement with
23 the commercial creditors only to find two weeks before the
24 voting deadline, because of activity in Congress with respect
25 to the Fair Act, that what was a consensual plan turned into

1 a contested plan, and we are a case where we thought, Your
2 Honor, would be the first of the five major Chapter 11
3 asbestos cases to come out of Chapter 11, and unfortunately
4 not only are we still in Chapter 11 in connection with
5 Armstrong, but it doesn't look like that that company will be
6 emerging anytime soon because of challenges to confirmation,
7 and that is precisely what was tried to be avoided here, Your
8 Honor. Not to go down the path of what we - what all the
9 constituencies thought was the economic deal that had been
10 reached, and that only to find at the last minute because of
11 some external event that that deal craters.

12 THE COURT: Mr. Klauder?

13 MR. KLAUDER: Good morning, Your Honor. David
14 Klauder for the United States Trustee. On the threshold
15 issue that Your Honor had, which I still think is important
16 and wanted to just quickly reiterate that again is, what is
17 the Court being asked to approve here? That's the question.
18 The motion is couched in terms of a settlement, but it
19 appears what's happening here, it's a settlement of the
20 claims and the treatment of various creditors and such, which
21 seems to me is what a plan is for. So you have to go the
22 route of confirmation of plan. We don't want to cut that
23 off, and I think that threshold issue is very important.
24 We've heard implement and execute the agreement. That's what
25 the debtors are attempting or want authority to do, but of

1 course, they don't need Court approval to file a plan,
2 according to these terms, so I think it's very important that
3 Your Honor addresses that threshold issue, and we get past
4 that, that we're not circumventing the plan process here by
5 this agreement and really what is the purpose of the
6 agreement, and that goes into the meat of the objection,
7 which is the lockup portion of the agreement. Your Honor,
8 what counsel has indicated today what they believe to be
9 technical terms or technical arguments made by the United
10 States Trustee, I would characterize those as statutory
11 arguments. 1125(b) is pretty clear. It states that you
12 cannot solicit an acceptance or rejection of a plan until a
13 written disclosure statement is approved by the Court. The
14 plan proponents did in fact enter into the plan support
15 agreement post-petition and prior to a disclosure statement
16 being approved. The agreement binds the signatory creditors
17 to vote in favor of the plan provided it is consistent with
18 the settlement term sheet.

19 THE COURT: Well, actually, I do have a disclosure
20 statement that's been approved in this case. It's just not
21 in accord with the sixth amended plan, but I did
22 conditionally approve a disclosure statement. It was,
23 however, based on the fact that substantive consolidation
24 would be approved by the Third Circuit, and it wasn't, but
25 there is a disclosure statement that has essential economic

1 information of the debtor that's been approved by the Court.

2 MR. KLAUDER: But it doesn't deal with - I mean it's
3 completely different from what is happening here. It's a
4 totally different deal, the treatment of the creditors, and
5 what they're agreeing to vote in favor of is totally
6 different than that disclosure statement that was approved
7 sometime ago.

8 THE COURT: The deal is different, but the economic
9 situation that the debtor finds itself in but for the
10 vagaries of the market, because obviously stocks and bonds
11 trade at different values, and that would have to be updated
12 on pretty much an hour-by-hour basis till you get to the plan
13 confirmation. But, the structure of the debtor that's laid
14 out in the disclosure statement has really not changed. The
15 issue of course is the plan treatment because of the
16 substantive consolidation that's no longer going to happen.
17 But I guess the issue is, do I have to approve the disclosure
18 statement or do I have to approve a disclosure statement
19 before the debtor can continue to negotiate? You know,
20 somewhat of Hobson's choice, Mr. Klauder, and I'm sympathetic
21 to the U.S. Trustee's position in this case, but it is
22 somewhat of a Hobson's choice for the debtor and the creditor
23 constituents. They have to be able to bargain to come to a
24 consensual plan, but then when it comes to trying to insure
25 that the parties will stick to the bargain that they've made,

1 I guess the question is, How do you do it? Well, in most
2 cases you do it by soliciting the votes, but in this case, I
3 thought this was going to be the first case out of
4 bankruptcy. I saw no basis for this case to be here for six
5 years or five years. It's been here this long. If it takes
6 making sure that the bonds that should continue to trade
7 actively, because that's in the best interest of everybody to
8 have the bonds trading, trade knowing that they're going to
9 be in a locked position with respect to a particular plan if
10 that plan is filed by the debtor with those terms in it, and
11 it's post-petition. It is not a pre-petition, non-disclosed
12 document. Im not why that's so wrong.

13 MR. KLAUDER: Your Honor, it's - I think 1125(b) is
14 pretty clear. It's in violation of that and the Third
15 Circuit interpretation of 1125(b) in Century Glove.

16 THE COURT: Well, what that says is that you can't
17 accept or reject the plan before commencement of the case
18 under certain circumstances in 1120 - I'm sorry, that's I'm
19 looking at 1126.

20 MR. KLAUDER: Right, okay.

21 THE COURT: That an acceptance or rejection of the
22 plan can't be solicited after commencement unless at all
23 times before that solicitation there's transmitted to the
24 holder the plan or a summary of the plan and a written
25 disclosure statement approved after notice and a hearing by

1 the Court as containing adequate information. Well, all of
2 these entities have received that disclosure statement that I
3 think still does contain adequate information with respect to
4 the debtors - what led the debtor into bankruptcy and what
5 the debtor has done post-petition. What's changed, of
6 course, is the itemization as to what's going to happen to
7 the creditor constituencies because that can't work.

8 MR. KLAUDER: And we would argue that that's
9 important and that, I mean, I can't say that I've researched
10 that issue, whether it's a disclosure statement or the
11 disclosure statement. I will say that it said the plan in
12 1125, and what we're talking about here is the sixth amended
13 plan. So there has not been a disclosure statement approved
14 for the sixth amended plan.

15 THE COURT: That's true.

16 MR. KLAUDER: So we would argue that that's the
17 issue, not some disclosure statement prior to it, and yes,
18 the debtors' position or the debtors' financial situation may
19 not have changed, but the treatment for creditors and the
20 treatment under - that's going on here has changed
21 substantially, and that would be an important part of the
22 disclosure statement, I would think, so -

23 THE COURT: Well, here's - The section itself in
24 1125(a) defines what adequate information is, and it says,
25 and I'm going to read it in the version that exists -

1 MR. KLAUDER: Can I get my Code, so -

2 THE COURT: Uh-huh.

3 MR. KLAUDER: I'll just step away.

4 THE COURT: I'm reading it in the version, the old
5 version, before the amendments which apply to this case. In
6 this section adequate information means information of a kind
7 and in sufficient detail as far as is reasonably practicable
8 in light of the nature and history of the debtor and the
9 condition of the debtor's books and records that would enable
10 a hypothetical investor of the relevant class to make an
11 informed judgment about the plan but adequate information
12 need not include such information about any other possible or
13 proposed plan. So, if in fact the disclosure statement
14 contained adequate information but the plan has been
15 modified, I'm not sure that I don't have an approved
16 disclosure statement.

17 MR. KLAUDER: But how can a hypothetical or a
18 claimant make an informed judgment about the plan if they
19 don't know about the - if the treatment of the plan - They
20 need to know about that to make a judgment about whether to
21 vote in favor or against the plan.

22 THE COURT: But I think that's what this is saying.
23 The disclosure statement went out in connection with whatever
24 number, fourth - I'm not sure. Whatever the plan was that
25 the disclosure statement was approved with respect to, and

1 then I think the issue is do you always have to re-approve
2 disclosure statements. I think this section is saying, no,
3 sometimes the same disclosure statement can be used even if
4 there is a different plan that is proposed.

5 MR. KLAUDER: But they're not doing that here.
6 They're going down that road again with another disclosure
7 statement.

8 THE COURT: They are because of the treatment of the
9 classes and frankly because I'm conservative enough about
10 that that they know I'd order it anyway, probably, even if
11 they didn't want it. Well, and in fact, I said that I'd
12 order it at the time that I approved that disclosure
13 statement to the extent that substantive consolidation would
14 change the treatment of the classes. So I think they do need
15 to amend the disclosure statement, but with respect to the
16 adequacy of information, I'm not sure that that test under
17 the circumstances of this case isn't met. I'm not sure I'd
18 want to be making that statement in all cases, but I don't
19 think that the historical facts or the problems that the
20 debtor has been facing post-petition have changed, really.
21 The issues are the same. What's the estimation? Is
22 substantive consolidation going to be approved, and to the
23 extent that the Cybergeneics issue has any bearing going
24 forward, who's going to take over the avoidance actions?
25 Those have been the issues since the beginning of the case.

1 MR. KLAUDER: Your Honor, I haven't researched the
2 issue. I mean, there's not too much on 1125(b).

3 THE COURT: No.

4 MR. KLAUDER: so, I'm not sure that there would be
5 much on this particular issue, so I don't feel comfortable
6 certainly arguing what's out there with cases. I just would
7 respectfully disagree with the interpretation. I think the
8 treatment of the creditors that is substantially changed, is
9 extremely important and is part of adequate information and
10 is part of what a claimant would need to make an informed
11 judgment whether to vote in favor or against the plan.

12 THE COURT: Okay.

13 MR. KLAUDER: Your Honor, then going to what we
14 argued in the objection, we cited an important provision of
15 the agreement, which was the specific performance provision
16 of the agreement which is at paragraph, I believe - just so
17 we're clear, paragraph (19) of the agreement. I'm not going
18 to read that verbatim, but what that in essence creates is a
19 remedy of injunctive relief, meaning if there's a breach of
20 the agreement, if one of the signatory creditors does not
21 vote in favor of the plan, then they can be forced to vote in
22 favor of that plan. You ask what happens if a creditor votes
23 - a signatory creditor votes rejection to the plan? The
24 debtors or the plan proponents can come in and say, Yes, we
25 have this ballot that says, Rejection to the plan, after we

1 went through the whole solicitation process, after the
2 disclosure statement was approved, we have this ballot that
3 says, Rejection, but you know what, we have this plan support
4 agreement that they signed. So, rip up that ballot, that
5 doesn't count. Look at the plan support agreement. Their
6 vote should be changed and should be an acceptance of the
7 plan.

8 THE COURT: Well, is that any different than asking
9 the Court to designate a vote because of, you know, some, I
10 guess, bad faith because they agreed to a lockup and then
11 they voted a different way?

12 MR. KLAUDER: No, I guess not. I mean - In the
13 cases that we cited, the two cases by Judge Walrath in this
14 district kind of went down that path where the agreement did
15 not come in front of the Court prior to the disclosure
16 statement and all that. It came at the back-end where it was
17 at confirmation, and we moved to designate those votes, and
18 Judge Walrath found in both cases and agreed with our
19 position and stated that post-petition lockup agreements are
20 invalid under 1125(b). And, Your Honor, we would submit that
21 those rulings, while certainly not binding on you are
22 persuasive when the Chief Judge of this district with very
23 similar agreements, if not identical agreements, finds that
24 post-petition lockup agreements are invalid under 1125(b).

25 THE COURT: But they weren't - I think the

1 difference is to the extent that you have a lockup agreement
2 that actually solicits a vote by a class and haven't sent it
3 out to anyone on any kind of notice, it almost looks like a
4 secret agreement that is somehow or other wrong. I don't
5 know what other sin to put on it, but wrong. But when the
6 parties themselves have reached an agreement and the purpose
7 is to make sure that the time delay, which is necessitated by
8 virtue of the Bankruptcy Code because you have to go through
9 the disclosure statement approval in a solicitation process,
10 and by virtue of whatever events may happen in that time
11 frame and the trading, which is very active, are the problems
12 that could lead to the change in the votes, is that not a
13 slightly different circumstance from what Judge Walrath faced
14 in those two cases?

15 MR. KLAUDER: Well, Your Honor, there was no
16 indication of bad faith or trying to sweep something under
17 the rug in those cases. 1125(b) doesn't have any of those
18 sort of exceptions when you come out and you do this in front
19 and where everybody knows what's going on, then it's okay.
20 Judge Walrath looked at it strictly under 1125(b) and Century
21 Glove so I don't think those issues came into play, and I
22 don't think they should. 1125(b) is pretty clear, and Judge
23 Walrath found that to be the case, and let me just cite to
24 you Century Glove, the Third Circuit relevant authority,
25 where they held that a party does not solicit acceptances

1 when it presents a draft plan for the consideration of
2 another creditor but does not request that creditor's vote.
3 We would argue that that is exactly what's happening here.
4 They have requested that creditor's vote, and it was done
5 prior to the disclosure statement being approved on this
6 plan, and as such, it's in violation of 1125(b).

7 THE COURT: All right. Well, what would your
8 position be if the debtor's out of this mix altogether, but
9 the creditors agree that so as to be able to confirm a
10 consensual plan, they enter into an agreement that they then
11 present to the debtor and if the debtor chooses to put it in
12 the plan, the debtors does, and if the debtor doesn't then it
13 won't be a consensual plan?

14 MR. KLAUDER: They enter into agreement to vote in
15 favor of the plan?

16 THE COURT: They enter into a contract that says
17 that to the extent that the bonds are traded, the voting
18 rights that are agreed upon as of a certain date will be
19 traded with the bonds, and that provided that a plan is
20 proposed that says X, that they'll vote in favor of that
21 plan.

22 MR. KLAUDER: But who did they enter the contract
23 with? I mean, I think that -

24 THE COURT: With their creditor constituents.

25 MR. KLAUDER: Well, I think that's a different

1 scenario, and I don't know that we would have an issue with
2 that. I mean the issue is the plan proponent soliciting the
3 acceptance and rejection, the votes on the plan. That would
4 be the issue, so, I don't think that would be an issue for us
5 or an issue under 1125(b). I think that's a different
6 scenario.

7 THE COURT: Okay.

8 MR. KLAUDER: Your Honor, if you have any other
9 questions, I'd be happy to answer those, but those are the
10 arguments I wanted to make. Thank you.

11 THE COURT: All right, thank you.

12 MR. CASARINO: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. CASARINO: Marc Casarino from White & Williams
15 on behalf of Century Indemnity. I have with me my colleague
16 Joe Gibbons, also from White & Williams. He's been admitted
17 *pro hac vice*, and he'll this argument if I may cede the
18 podium to him.

19 THE COURT: Fine, thank you.

20 MR. CASARINO: Thank you, Your Honor.

21 THE COURT: Good morning, Mr. Gibbons.

22 MR. GIBBONS: Good morning, Your Honor. Century's
23 position is pretty simple. The question is if this agreement
24 is approved by the Court, what is the effect of the Court's
25 approval? Number one, who's bound by the agreement and to

1 what extent is the debtor in this case seeking prior approval
2 of terms that are going to be incorporated in the sixth
3 amended plan? Century is a party to the appeal before the
4 Third Circuit. We're not a party to the plan support
5 agreement. We filed objections to the fifth amended - the
6 disclosure statement for the fifth amended plan. We have
7 issues with the sixth amended plan because we believe they
8 violate our rights, and to the extent that the plan support
9 agreement locks the debtor in to certain provisions in the
10 sixth amendment plan, then we're concerned that the approval
11 of that plan, unless our rights are reserved, the approval of
12 the plan support agreement will prejudice our rights and
13 limit our rights to oppose the sixth amended plan.

14 THE COURT: Well, I think the point that you and Mr.
15 Klauder both made with respect to the fact that this is not a
16 pre-approval of the plan is a good one. It's not a pre-
17 approval of the plan. There isn't a plan on the table
18 subject to approval today, so I'm not going there, but to the
19 extent that the parties are asking that some document among
20 themselves be approved that will be incorporated into a plan,
21 I think if there is a preservation of all parties, non-
22 parties to the agreement's rights to object to any disclosure
23 statement and the plan, I think that takes care of one of
24 your issues, and I think this agreement or order that
25 approves it, if one is entered, does have to do that.

1 MR. GIBBONS: Your Honor, that would be our wish.

2 THE COURT: Okay.

3 MR. GIBBONS: Just to clear up a couple of things
4 that were said on the record earlier, number one, Century is
5 a creditor, and there's a whole standing issue before this
6 Court about a year and a half ago as to whether or not
7 Century could participate in the estimation. We got Court
8 approval to participate in the estimation proceeding. We are
9 like the lone surviving appellant before the Third Circuit,
10 and one of the interesting things about the fifth amendment
11 plan and the sixth amendment plan is that by virtue of the
12 class of creditor that Century is in, the plan provides that
13 all creditors in that class waive their right to appeal the
14 estimation order. So, if this plan support agreement is
15 binding on anybody, including Century, we are prejudiced in a
16 big way. The Third Circuit agreed with the debtor to adjourn
17 the arguments on appeal to see what happens with respect to
18 the plan, but it is adjourned. Our appeal is still active,
19 and -

20 THE COURT: But you're going to be in that class
21 whether the plan support agreement is confirmed or not under
22 this plan, and if your rights to object to the plan are
23 preserved, why does this agreement itself cause some
24 prejudice?

25 MR. GIBBONS: The agreement requires, is my

1 understanding, the agreement provides that the parties agree
2 that the sixth amended plan is going to have certain
3 provisions.

4 THE COURT: Right.

5 MR. GIBBONS: And otherwise the sixth amended plan
6 is going to be substantially similar to the fifth amended
7 plan.

8 THE COURT: Which already has you in a class -

9 MR. GIBBONS: Which already has me in a -

10 THE COURT: - waiving the appeal rights.

11 MR. GIBBONS: Right.

12 THE COURT: Right.

13 MR. GIBBONS: So, as long as all of our rights are
14 preserved to object to the plan and assert our rights going
15 forward, our issue with the approval of the plan support
16 agreement is resolved.

17 THE COURT: Okay, well, I am happy to -

18 MR. LOCKWOOD: We're prepared to agree with Century
19 that the order approving the plan support agreement have a
20 specific provision in it saying that Century is not bound
21 with respect to any disclosure statement or confirmation
22 objections it might have by the Court's approval of the plan
23 support agreement. The debtor, I believe, is willing to
24 agree to that too.

25 MR. GIBBONS: That's fine, Your Honor -

1 MR. LOCKWOOD: That should satisfy Mr. Gibbons' last
2 position.

3 THE COURT: All right, so it's not - essentially
4 it's not waiving any right to bring forth an objection to the
5 disclosure statement or plan.

6 MR. LOCKWOOD: Exactly, Your Honor . . . (microphone
7 not recording).

8 THE COURT: Okay, that's fine, and I think an order
9 to that extent can be incorporated, but I'm still not to
10 approval of the agreement yet.

11 MR. GIBBONS: Well, that resolved our issue, Your
12 Honor.

13 THE COURT: Okay, thank you.

14 MR. GIBBONS: Thank you.

15 MR. RAICHT: Good morning, again, Your Honor.
16 Geoffrey Raicht from Sidley. I think everyone who wanted to
17 be heard has been, unless I'm mistaken. But just a couple of
18 points just to get back and say this is it. Your Honor's
19 absolutely right that, you know, the plan support agreement
20 does not seek to approve the terms of the sixth amended plan.
21 It's all going to come before Your Honor at confirmation.
22 That is exactly what is not before you today. I think, Your
23 Honor, you pose a hypothetical to the U.S. Trustee about a
24 contract that was largely negotiated between creditors and
25 then brought to a debtor, and I think that the circumstances

1 described in your hypothetical, Your Honor, are very similar
2 to what happened in this instance. So, I think that we're
3 pretty much close to your hypothetical, Your Honor. I wanted
4 to -

5 THE COURT: Well, no, you're not because the
6 debtor's a party to it.

7 MR. RAICHT: The debtor is a party to it, Your
8 Honor, and I think in your hypothetical, if I understood you
9 correctly, is that the creditors negotiated the document and
10 then brought it to the debtor.

11 THE COURT: For a plan. To put it into a plan, not
12 to sign off on the agreement. To say, Here, this is what
13 we've agreed to. We're willing to vote for a consensual plan
14 provided that the debtor agrees -

15 MR. RAICHT: Uh-huh.

16 THE COURT: - representing whatever other
17 constituencies are out there, that this is a good idea and
18 proposes this plan.

19 MR. RAICHT: Again, I think that, you know, in this
20 case, the creditors have, again, what the creditors have
21 among themselves said, if the plan provides X, Y, and Z, we
22 will support a plan, and they presented it to the debtor and
23 the debtor in an abundance of caution and to be fully - with
24 full disclosure to everybody, have brought it before this
25 Court, again, not to approve the terms of the plan, but to

1 permit the debtor to execute and implement the roll forward,
2 if you will, so we can get there.

3 THE COURT: But, you don't need my permission to do
4 that. The one thing the debtor doesn't need while it's in an
5 exclusive period is permission from the Court to file a plan.

6 MR. RAICHT: Correct.

7 THE COURT: So, the debtor does not need -

8 MR. RAICHT: That's correct, but, again, I don't
9 want to sit down with this, I want to go back and beat an
10 argument done before, but, again, the real meat of the plan
11 support agreement is that the parties who are part to it are
12 obligated under it for claim straightening purposes,
13 whatever. I know we covered that ground, Your Honor.

14 THE COURT: But why is the debtor obligated in a
15 claim straightening issue?

16 MR. RAICHT: The debtor's trying to put - It is the
17 debtor's exclusive period, and the debtor's putting forth a
18 plan to which its creditor constituencies, both asbestos, who
19 represents approximately \$7 billion of debt, and the
20 bondholders, who have another, I think, a billion-something
21 of debt. They have agreed the debtor's putting forth a plan.
22 We're all coming together in a consensual manner, and I think
23 the debtor's view is appropriate that we are a party to that.

24 THE COURT: Well, I think there is where your
25 problem is. You folks want to take a few minutes and see

1 whether or not the debtor has to be a party to this
2 agreement?

3 MR. RAICHT: Sure, Your Honor, thank you.

4 THE COURT: I'll take just a brief five-minute
5 recess so you folks can talk.

6 (Whereupon at 11:22 a.m. a recess was taken in the
7 hearing in this matter.)

8 (Whereupon at 11:33 a.m. the hearing in this matter
9 reconvened and the following proceedings were had:)

10 THE COURT: Please be seated.

11 MR. RAICHT: I'm sorry for the delay, Your Honor.

12 THE COURT: All right.

13 MR. RAICHT: Geoffrey Raicht for Sidley Austin.

14 Your Honor, we have caucused - I'm sorry, two minutes, Your
15 Honor?

16 THE COURT: All right.

17 MR. LOCKWOOD: Sorry, Your Honor.

18 THE COURT: Okay.

19 MR. RAICHT: Apologies, again, Your Honor.

20 THE COURT: Okay.

21 MR. RAICHT: As I was saying, Your Honor, I believe
22 we have discussed with the relevant parties. Your Honor, I
23 believe it will resolve your concerns with respect to this
24 motion, I believe that the parties will endeavor over the
25 next two/three days to amend the agreement to remove the

1 debtor as a party and come back to Your Honor on Friday in
2 Pittsburgh with what we hope to be an amended plan support
3 agreement. Would that resolve Your Honor's concern?

4 THE COURT: Mr. Klauder?

5 MR. KLAUDER: Your Honor, that proposal, so to
6 speak, was floated to me and off the top of my head I said,
7 no, because there would still be the issue of the plan
8 proponents, the ACC and the FCR being part of the agreement
9 and having the ability to use the lockup portion. Now, if
10 the proposal is to continue this until Friday and give a
11 couple days to kind of think about that issue and maybe some
12 other issues, I have no problem with that and discussing it
13 with them, but off the top of my head on that specific
14 proposal, I don't think it's going to be sufficient to
15 satisfy our concerns.

16 THE COURT: Okay, well, Mr. Lockwood?

17 MR. LOCKWOOD: Your Honor, just to be brutally frank
18 about all of this, we - I believe that we could probably get
19 to the point where we could amend the agreement pursuant to
20 its provisions - it's a written document and we can't do it
21 in open court - if it will solve the problem. However, I
22 want to make it clear from the ACC and the - Well, I'm let
23 Mr. Kress speak for himself. For the ACC's perspective, the
24 lockup provisions here are critical. I mean, we've been
25 burned in the Armstrong cases. Mr. Kress described it by

1 making a deal with a creditor constituency and then having
2 them sell their positions out and legislative developments,
3 and they voted against the plan, and two years later we're in
4 litigation with them over it. So, if the U.S. Trustee's
5 position is that a lockup agreement with entities other than
6 the debtor but who are co-plan proponents with the debtor
7 violates 1125(b), which we would disagree with, and if
8 they're prepared to press that and I don't know, take an
9 appeal or whatever, then we prefer rather than running around
10 like a bunch of chickens trying to get the agreement amended
11 to achieve something that won't satisfy the U.S. Trustee, we
12 prefer to have Your Honor go ahead and decide it now and, you
13 know, basically let us know whether we can do this deal or
14 not.

15 THE COURT: Okay, well, I think that's fair. I
16 think the issue is whether or not the creditors as creditors
17 can form a contract without taking a look at the plan
18 solicitation issue, and if the creditors among themselves can
19 come to some agreement that says if the debtor and/or others
20 propose this plan, we'll vote for it, then I think they're
21 free to contract as they choose. But the issue, I think,
22 becomes more complex from the U.S. Trustee's point of view
23 when the plan proponents are parties to the agreement. I
24 only asked about the debtor because frankly I thought that
25 the creditor constituents as parties to the agreement are

1 creditors no matter how you look at it or representatives of
2 the creditors, and they could bind the people that they
3 represent in that capacity. But if it doesn't solve the
4 problem, then I agree. There's no point in having an amended
5 document floated that removes the debtor if the issue is
6 still there. So, I don't know, Mr. Klauder, is there any
7 benefit to my deferring some ruling to let you discuss this
8 with the other plan proponents or is the U.S. Trustee's
9 position going to be fixed in that respect?

10 MR. KLAUDER: I think it's going to be fixed, Your
11 Honor.

12 THE COURT: Okay. I am going to, I think, defer
13 ruling on this until Friday so that I can take a look again
14 at the cases and at 1125. I really am not aware of many
15 cases, in fact maybe none, under 1125(b) that hit this
16 specific issue that I raised earlier about a disclosure
17 statement as opposed to the disclosure statement to accompany
18 a plan. I'm going to see if I can find anything along that
19 line. I tend to think that will be a useless exercise, but
20 nonetheless, I want to see if I can.

21 MR. LOCKWOOD: Your Honor, when you're doing that, I
22 would ask you to read very carefully Section 4 of the plan
23 support agreement which contains the lockup provisions that
24 the U.S. Trustee is objecting about and keep in mind that the
25 term sheet and the plan support agreement predate the filing

1 of the sixth amended plan so that in fact there was no sixth
2 amended plan in existence at the time that this commitment
3 was given. This is a conditional commitment on the part of
4 the bondholders and explicitly within the language of Section
5 4 itself, it contains various requirements that the plan when
6 it is drafted and filed will have to comport with. So that
7 to the extent that 1125(b) talks about getting an acceptance
8 of a plan there was no acceptance of a plan that occurred as
9 a result of this. What there was, was an agreement that
10 there would be a plan and if it met certain parameters then
11 the parties to this agreement, the bondholder parties to this
12 agreement would vote for it.

13 THE COURT: Okay. Mr. Klauder?

14 MR. KLAUDER: Your Honor, I was just going to point
15 out on that issue that the disclosure statement or a
16 disclosure statement that we're kind of up in the air as to
17 what other law is out there. I would like to research the
18 issue too if - I don't know if you're open to have anymore
19 argument on Friday on that particular issue if I find
20 something I can address with you. I'd be happy to do that.

21 THE COURT: Sure, if you find a case, frankly, if
22 you send me - or file something that's just a letter brief
23 that says, Look at this case. I'll be happy to read the case
24 even without any argument, so if you find something and I
25 don't, I don't want to miss it -

1 MR. KLAUDER: Okay.

2 THE COURT: - so I'd be happy to notify the other
3 parties. That way if somebody else has some challenge, they
4 can do it too. All right. I will take this matter under
5 advisement, but I will make a ruling on Friday and announce a
6 ruling on Friday.

7 MR. RAICHT: I'm sorry, Your Honor. Geoffrey Raicht
8 again. With respect to the case as a letter briefing, the
9 debtors would also like the opportunity to submit something.

10 THE COURT: Sure.

11 MR. RAICHT: Would there be a deadline that Your
12 Honor would establish to submit those?

13 THE COURT: Well, Thursday would be good if I'm
14 going to make a ruling on Friday.

15 MR. RAICHT: I appreciate it, Your Honor.

16 THE COURT: How about Thursday at noon.

17 MR. RAICHT: Perfect, Your Honor, thank you.

18 THE COURT: Anybody who finds something that you
19 think is relevant for me to look at, I'll accept a - just a -
20 I'm not sure what. I guess a letter that you can send on e-
21 mail file. Is there some miscellaneous pleading or call it a
22 letter memo and file it as a brief attached to this.

23 MR. LOCKWOOD: You could call it a list of
24 supplemental authorities, which is something that is
25 recognized by the rules.

1 THE COURT: Well, I was trying to get something that
2 CMECF would accept. I don't really care what name you put on
3 it as long as you link it to this. Call it a list of
4 supplemental authorities, that's fine. Link it to this
5 document number and file it by Thursday at noon.

6 MR. PERNICK: Your Honor, if you want, when
7 everybody serves us with a copy we'd be happy to put an e-
8 mail together and send it to the Court with everybody's
9 submissions.

10 THE COURT: That would actually be easier because
11 then I'd get it at one time, if anybody finds anything.
12 Look, you folks do this all the time too. Are any of you
13 aware of any cases on this subject? No, nobody is, because
14 I'm not either. So I have a feeling it's going to be a
15 pretty short list, but, okay.

16 MR. PERNICK: so everybody will still file
17 electronically, but then we'll amass whatever gets filed and
18 we'll put it in one package for the Court.

19 THE COURT: All right, thank you. All right, with
20 respect to Century's issues though, would you folks please
21 work out some language that satisfies Century that it's
22 rights to object to the disclosure statement and plan will be
23 preserved because if I do find a way to approve this
24 agreement, I'd at least would like to have that issue
25 resolved before Friday. Okay. And so, Mr. Pernick, will you

1 bring to court a revised order on Friday?

2 MR. PERNICK: Yes.

3 THE COURT: Okay. All right, thank you.

4 MR. PERNICK: Thank you very much, Your Honor.

5 THE COURT: We're adjourned.

6 (Whereupon at 11:45 a.m. the hearing in this matter
7 was concluded for this date.)

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19 I, Elaine M. Ryan, approved transcriber for the
20 United States Courts, certify that the foregoing is a correct
21 transcript from the electronic sound recording of the
22 proceedings in the above-entitled matter.

23

24 /s/ Elaine M. Ryan
Elaine M. Ryan
2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221

June 23, 2006